

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

12147

PL-11

FILE: B-191043

DATE: November 28, 1979

MATTER OF: Fortec Constructors, Inc.--  
Reconsideration

**DIGEST:**

*[Request For Reconsideration of Bid Rejection]*

1. Allegation that agency deliberately modified earlier interpretation of IFB in order to deprive protester of award is not supported in record.
2. Since request for reconsideration merely restates protester's original arguments without demonstrating errors of fact or law, decision is affirmed.

Fortec Constructors, Inc. (Fortec) requests reconsideration of our decision, Fortec Constructors, Inc., B-191043, May 1, 1979, 79-1 CPD 302, regarding invitation for bids (IFB) No. GS-04B17008, issued by the General Services Administration (GSA), Region 4, Atlanta, Georgia.

We denied Fortec's protest of the award of a contract (for construction of foundations for an addition to the United States Court House in Miami, Florida) to any bidder other than itself. We concluded that GSA had properly awarded the contract to Bartlett Construction, Inc. (Bartlett) as the lowest, responsible, responsive bidder.

In summary, the facts are these. GSA first issued the IFB on November 14, 1977. Fortec submitted the only bid. However, GSA determined Fortec's bid price was unreasonably high and rejected the bid. Fortec then filed suit in the United States District Court for the Southern District of Florida (Fortec Constructors v. J. Solomon, Administrator, Civil Action No. 78-812), alleging that its bid price was reasonable and that the Government estimate was too low. The

*Reconsideration  
Contract award protests  
Construction contracts  
Solicitation specifications  
Litigation*

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essential issue in dispute was the cost of "dewatering", with both parties disagreeing on the interpretation of the dewatering requirements contained in the solicitation. The court found that Fortec failed to show that GSA's determination that Fortec's bid was unreasonably high was without a rational basis.

GSA issued a second solicitation. Bartlett was the low bidder; Fortec was second. As noted above, we denied Fortec's protest that Bartlett was neither responsible nor responsive.

In its request for reconsideration, Fortec alleges that our decision avoids dealing with its contention that GSA "deliberately misled the district court" on the interpretation of IFB dewatering provisions in order to deprive it of an award. Fortec contends that we therefore treated it in a "cavalier fashion".

Fortec argued that the agency offered one interpretation of the IFB dewatering provision to the district court, but modified that interpretation in responding to Fortec's protest to our Office. We did not ignore that argument. We stated:

"[W]e have considered Fortec's assertion that GSA's position has been inconsistent in that GSA was advancing other interpretations of the specialist requirement in the court litigation. While there appears to be some merit to that contention, we find it irrelevant here since GSA asserts that its earlier interpretations were in error and we believe its current position is both reasonable and consistent with the IFB."

Nonetheless, Fortec contends that GSA's change of position is not irrelevant. Fortec maintains that if the agency had advanced the same arguments to the court as it advanced to our Office, Fortec would have won the suit and received award under the initial solicitation.

We continue to believe that the Government's modification of its earlier interpretation of the dewatering provisions is irrelevant to the issues raised in Fortec's protest. The main issue of the protest was the responsibility of Bartlett in light of the dewatering provisions. That provision required the contractor to employ a dewatering specialist with five years of experience. GSA's position before our Office was that the contractor could satisfy the requirement by having an employee who was such a specialist. We agreed with that interpretation, not merely because it was advanced by GSA, but because it was reasonable and consistent with the IFB read as a whole. Consequently, we found that Bartlett could be found to be a responsible bidder on the basis of the evidence the firm submitted concerning the experience of its employees. That responsibility determination, based on what we believe to be the legally correct interpretation of the IFB provision, could not be precluded because GSA might have erroneously interpreted the provision differently elsewhere.

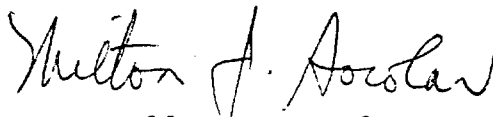
That is not to say we would condone deliberate agency attempts to mislead judicial or administrative forums. We saw no such attempt here. The record indicates that the "inconsistency" to which Fortec generally refers is contained in the Defendant's Proposed Findings of Fact and Conclusions of Law which were drafted by the U.S. Attorney (not GSA) and filed with the court. In the proposed findings and conclusions, the Government on the one hand seemed to regard the pump operators (engineers) as the specialists mentioned in the IFB, but on the other hand referred to the bidder (the firm) as the specialist. There was also conflict on the trade custom in Florida regarding subcontracting for dewatering. Thus, while part of the Government's proposed findings was inconsistent with GSA's later position, another part was not, and the proposed findings, in any event, were not adopted by the court. Moreover, we think GSA acted reasonably in adopting a position here that clarified the conflicting argument made to the court. We saw no evidence that GSA "deliberately misled the district

court \* \* \* for the purpose of depriving [Fortec] of an award it was entitled to receive," and therefore we had no reason to question the agency's good faith. There is nothing in Fortec's reconsideration request which provides a basis for our adopting a different position.

In any event, if Fortec thinks that GSA deliberately misled the district court, we think Fortec more appropriately should have brought the matter before the district court.

Lastly, Fortec continues to question the responsibility and responsiveness of the low bidder. The protester's current position, however, is merely a summary statement of the arguments previously advanced and answered in our decision. The standard to be applied in considering requests for reconsideration is whether the request demonstrates errors of fact or law in our decision. J. H. Rutter Rex Manufacturing Co., Inc.--Request for Reconsideration, B-184062, July 6, 1976, 76-2 CPD 9. Since Fortec has only restated its arguments and not demonstrated errors of fact or law, we find no basis to reconsider these points.

Our decision is affirmed.



For the Comptroller General  
of the United States